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IN THE

Supreme Court of the United States

October Term, 1960

No. 500

ROBERT G. THOMPSON,
Appellant,

v.

SUMNER G. WHITTIER, Administrator of Veterans' Affairs,
Appellee.

On Appeal from the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the District Court is reported at 185 F. Supp. 306 and is set forth in Appendix "A" *infra* pp. 39-56.

Jurisdiction

This suit for declaratory judgment and injunctive relief was instituted under 28 U. S. C. 1331; 28 U. S. C. 2201, and Sec. 10 of the Administrative Procedures Act, 5 U. S. C.

1009. The complaint sought a judgment declaring unconstitutional and enjoining enforcement and execution of Section 4, Public Law #144, 78th Congress (former 38 U. S. C. 728, present 38 U. S. C. 3504) pursuant to which appellee, Administrator of Veterans' Affairs, declared forfeit appellant's service connected disability compensation previously awarded him. The complaint also sought judgment declaring the forfeiture illegal and unconstitutional and ordering appellee to restore payment to appellant of his compensation as accrued and to accrue. A three-judge court was convened on application of appellant under 28 U. S. C. 2282 and 2284 (R. 105). The final order of the District Court granting appellee's motion for summary judgment, denying appellant's motion for summary judgment, and dismissing the complaint was entered on June 29, 1960 (Appendix "A", *infra*, p. 57). A notice of appeal to this Court was filed in the District Court on August 25, 1960 (R. 102). The jurisdiction of this Court to review by direct appeal the decision entered in this cause is conferred by 28 U. S. C. 1253; *International Ladies Garment Workers Union* v. *Donnelly G. Co.*, 304 U. S. 243, 250.

Statute Involved

Public Law 144, Section 4, 78th Congress (former 38 U. S. C. 728, present 38 U. S. C. 3504) provides in relevant part:

> "Forfeiture for treason
>
> (a) Any person shown by evidence satisfactory to the Administrator be guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or of its allies shall forfeit all accrued or future gratuitous benefits under laws administered by the Veterans' Administration."

Questions Presented

1. Whether the Forfeiture Statute which provides for forfeiture of benefits, to which a veteran would otherwise be entitled, on an administrative determination of guilt of mutiny, treason, sabotage or rendering assistance to an enemy of the United States or its allies imposes punishment in violation of the constitutional proscription against bills of attainder and against imposition of punishment without judicial trial and trial by jury.

2. Whether the Forfeiture Statute is unreasonable, arbitrary and discriminatory in violation of the Fifth Amendment.

3. Whether the Forfeiture Statute, as construed and applied to ground forfeiture of a veteran's service connected disability compensation on speech and writings critical of the Government during time of war, violates the First Amendment.

4. Whether the phrase "rendering assistance to an enemy" in the Forfeiture Statute, as construed and applied to speech and writings critical of the Government during time of war, is vague and indefinite in violation of the Fifth Amendment.

5. Whether the declaration of forfeiture is void in that it was based on unauthorized grounds, on no substantial evidence and on procedures which violate the requirements of due process.

6. Whether the declaration of forfeiture is subject to judicial review.

Statement

Appellant, a citizen of the United States, served in the United States Army during World War II from November 28, 1941 to August 23, 1943, when he received an honorable discharge. Appellant's war record was outstanding. He

was awarded the Distinguished Service Cross for extraordinary heroism in battle during the New Guinea campaign of 1943. Moreover his competence and character were deemed to be of such high order as to justify recommendation for a battlefield commission as a captain. He was evacuated before the necessary procedures could be carried out (R. 23).

Appellant incurred pulmonary tuberculosis while in service and, on October 30, 1942, appellee determined, under applicable provision of law now codified in 38 U. S. C. Secs. 310, 314 and 315, that appellant was entitled to receive monthly benefits for this disability from and after August 24, 1943. The disability was subsequently arrested but appellant was thereafter entitled to receive monthly benefits for arrested tuberculosis under the provision now codified in 38 U. S. C. Sec. 314 (q). Payments of benefits were made until June 30, 1951 when they were discontinued (R. 23).

On July 20, 1948, appellant was indicted in the United States District Court for the Southern District of New York on a single count charging him with having violated former Section 3 of the Smith Act (former 18 U. S. C. Sec. 11; present 18 U. S. C. Sec. 371) by conspiring from or about April 1, 1945 and continuously thereafter to July 20, 1948, (a) to organize the Communist Party as a society or group of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and (b) to teach and advocate the duty and necessity of overthrowing and destroying the Government of the United States by force and violence, in violation of Section 2 of the Smith Act (former 18 U. S. C. Sec. 10; present 18 U. S. C. Sec. 2385) (R. 23-24).

Appellant was convicted on that charge and on June 4, 1951 his conviction was affirmed by this Court. *Dennis v. United States*, 341 U. S. 494. Appellant failed to surrender

following the affirmance of his conviction but was apprehended on August 27, 1953 and charged and convicted of contempt of court for his failure to surrender for service of his sentence on the Smith Act conviction (R. 23).*

On June 2, 1954, appellant received a letter from appellee's agent, Chairman of the Central Committee on Waivers and Forfeitures, hereinafter referred to as the Committee, advising appellant that the Committee had before it for determination the question of whether a forfeiture of benefits should be declared against him because of an alleged violation of the provisions of the Forfeiture Statute. The Chairman of the Committee further advised appellant in this communication that (R. 60):

> "A review of the record discloses that on October 14, 1949, you were convicted in the United States District Court, Southern District of New York for violation of the so-called Smith Act. The substance of the charge was a conspiracy to overthrow the Government of the United States by force and violence.† The indictment covered certain conduct on your part during the period April, 1945 at a time when hostilities in World War II had not been officially terminated, to July 1948. It is indicated up to the time of your conviction and subsequent thereto namely, up to the time of your apprehension and incarceration in August of 1953, you were engaged in conduct similar to that engaged in by you from April 1, 1945 to July 1948."

There was no notice in this communication as to the specific nature of the charge against appellant. For it recited

* Appellant was sentenced to serve a term of 3 years on the Smith Act conviction and 1 year on the contempt conviction—the sentences to run consecutively.

† It is to be noted that the Chairman of the Committee misstated the charge on the Smith Act charge against appellant. The charge involved a conspiracy to advocate overthrow. It was not a charge of conspiracy to overthrow.

the Forfeiture Statute in full and gave no indication as to which ground among the several recited therein was charged against appellant. Nor was there any notice in this communication of the nature of the evidence against appellant except the general statement quoted above. Appellant was invited by the Committee to meet this general accusation and unspecified evidence by submitting evidence which in his "opinion might explain [his] position in the matter in order that it might be determined by this Committee as to whether [he] violated the above quoted Forfeiture Statute" (R. 60).

Thereafter and on April 29, 1955, the Committee, by another written communication, informed appellant that it had determined forfeiture of plaintiff's accrued and future benefits because

> "* * * it is established to the satisfaction of this Committee that your conduct and activities, which formed the basis of your conviction in the District Court of the United States for the Southern District of New York on October 14, 1949, * * * continued subsequent to the commencement of the Korean conflict on June 27, 1950, and did, in fact, render assistance to an enemy of the United States or its allies within the meaning of Section 4, supra" (R. 63).

Appellant appealed from this determination to appellee's agent, the Board of Veterans' Appeals, hereinafter referred to as the Board, and requested an oral hearing thereon (R. 143). In a written communication dated May 26, 1956, the Board granted appellant's request for an oral hearing and summarized "the nature and substance of the evidence of record" (R. 13:14-21). The summary consisted of the record of appellant's convictions under the Smith Act and on the contempt charge; his membership and certain positions in the Communist Party; certain speeches, remarks and writings made or endorsed by him in 1950 and

1951 during the Korean conflict; and certain oral remarks attributed to him by a confidential informant. The speeches, remarks and writings were sharply critical of our involvement in the Korean conflict; of our foreign policy program; of the proposed McCarran Act subsequently enacted over the President's veto (50 U. S. C. Sec. 786); of the House Committee on Un-American Activities; and of our armaments program and its effect on our domestic economy and civil liberties (R. 14-21).

A hearing was subsequently held before the Board at which appellant was represented by counsel.* Appellant's counsel submitted a letter from appellant to the Board in which he denied the remarks attributed to him by the confidential informant and, except for minor exceptions which he noted, agreed to the accuracy of the remaining items of evidence summarized by the Board (R. 31-32). The Board subsequently excluded the remarks attributed to appellant by the confidential informant because the information concerning them "lacked particularity" and "was considered inadequate" (R. 32). At the hearings the accuracy of the remaining evidence as summarized by the Board and as amended by appellant was stipulated to by the parties (R. 31-32).

On July 31, 1956, the Board in a written opinion, affirmed the determination of forfeiture (R. 22-41). It held that the speeches and public utterances of appellant during the Korean conflict constituted rendering assistance to an enemy of the United States within the meaning of the Forfeiture Statute (R. 40). The evidence on which appellee relied to support its finding included "background" evidence not previously disclosed to appellant and concerning which appellant had no notice.

* Appellant was unable to attend the hearing because at the time of the hearing was serving his sentence under the Smith Act and subsequent convictions in the United States Penitentiary at Atlanta, Georgia.

On June 27, 1958, appellant petitioned the Board for reconsideration and on May 5, 1959, the Board in a written opinion, affirmed its prior decision (R. 42-56) relying on additional "background" evidence not previously disclosed to appellant.

On July 8, 1959, appellant instituted this action for Declaratory Judgment and Injunctive Relief in the United States District Court for the District of Columbia (R. 1-4). The complaint alleged that the Forfeiture Statute was unconstitutional on its face and as applied in that (a) it inflicts punishment without a judicial trial, and without trial by jury in violation of Article 1, section 9, clause 3 and the Fifth and Sixth Amendments; (b) it violates the due process clause of the Fifth Amendment; and (c) as applied it violates the First Amendment. In addition the complaint alleged that the forfeiture was illegal because the finding that appellant rendered assistance to an enemy of the United States was not supported by substantial evidence, was arbitrary and capricious, was based on inadequate grounds and erroneous interpretation of law and exceeded statutory authority (R. 3). Since the complaint sought to enjoin the enforcement and execution of the Statute (R. 1) appellant filed an application for a three judge statutory court pursuant to 28 U. S. C. 2282 and 2284 (R. 105). The application was granted (R. 65) and a three judge court, consisting of District Judges Alexander Holtzhoff and Richmond B. Keech and Circuit Judge Charles Fahy, heard argument on appellant's motion for summary judgment and appellee's cross motion for summary judgment and for dismissal of the complaint. On June 27, 1960, Judge Fahy dissenting, the District Court, in a written opinion, denied appellant's motion, granted appellee's motion for summary judgment and dismissed the complaint (Appendix "A", *infra*, pp. 39-52).

The District Court upheld the constitutionality of the statute on its face and as construed and applied (Appendix

"A", *infra*, p. 49). It held that the Statute "does not seek to impose punishment, but merely prescribes an additional qualification for eligibility to receive a gratuity" (Appendix "A", *infra*, p. 48). The court further held that 38 U.S.C. § 211 (a) precluded judicial review of appellee's decision (Appendix "A", *infra*, p. 51). It nevertheless discussed appellant's contentions as to the illegality of appellee's declaration of forfeiture on its merits and concluded that the grounds for forfeiture relied on by appellee was authorized by the Forfeiture Statute; that the findings of fact and conclusions of law were supported by substantial evidence; and that the proceedings did not violate the requirements of due process (Appendix "A", *infra*, pp. 51-52).

Judge Fahy, dissenting, found that the Forfeiture Statute as applied to "the speech and writings of the plaintiff constitutes a direct penalty for, and restriction upon, the use of speech and press" (Appendix "A", *infra*, p. 53). He noted that such an application of the Forfeiture Statute raises "the serious and delicate question whether the restriction violates the mandate of the First Amendment" and that the language of the Statute "not only does not mention speech or press but is so general as to the type of conduct intended to be covered that serious doubts arise not only under the First Amendment but under the Due Process Clause" (Appendix "A", *infra*, pp. 53, 55). Accordingly Judge Fahy construed the statute narrowly to avoid constitutional doubts and held that the forfeiture, on the grounds assigned by appellee was unauthorized by the statute and therefore invalid. He also held that appellee's decision in the case at bar was subject to judicial review (Appendix "A", *infra*, p. 56).

The Questions Are Substantial

The questions presented involve the constitutionality of an Act of Congress which singles out veterans who fought

in the armed forces of this country, as a class, for the imposition of a direct penalty for, and restriction upon, the use of speech and press and which confers on an administrative official, in extrajudicial proceedings, the power not only to deprive a veteran of compensation for disability incurred while in service but also to brand a veteran, whose record of service in World War II won him the Distinguished Service Award, with the infamous badge of having rendered assistance to an enemy of the United States. The questions are of plain importance. The importance is heightened where, as here, this power to defame and penalize is conferred by statutory language which provides no guidance as to the type of conduct for which the defamation may be made and the penalty invoked, and, as construed and applied, which permits such defamation and penalty because of speech critical of Government during time of war.

The questions raised are substantial. For the decision of the District Court on the merits is in conflict with applicable decisions of this Court. And the decision of the District Court, to the effect that appellee's determination of forfeiture is not subject to judicial review, is in conflict with a decision of the Court of Appeals for the District of Columbia Circuit.

I

The Forfeiture Statute is unconstitutional.

The Forfeiture Statute violates the Constitution in several respects. It constitutes a bill of attainder in violation of Article I, Section 9, Clause 3. It imposes punishment without judicial trial and trial by jury in violation of Article III, Section 2, Clause 3 and the Sixth Amendment. And finally it offends due process in that it is unreasonable and arbitrary and discriminates against veterans by imposing on them a penalty for certain conduct not imposed on non-veterans.

A. The Forfeiture Statute is a bill of attainder.

"A bill of attainder is a legislative act which inflicts punishment without judicial trial". *Cummings* v. *Missouri*, 71 U. S. 277, 323. If the Forfeiture Statute inflicts punishment in the constitutional sense it meets the definition of bill of attainder, for it inflicts punishment without judicial trial and solely on the basis of an administrative determination that the veteran is "guilty" of the offenses described therein.

The governing criteria in determining whether a disability inflicts punishment in the constitutional sense was recently described by this Court in *Fleming* v. *Nestor*, 363 U. S. 603, 614, as follows:

> "Where the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected. The contrary is the case where the statute in question is evidently aimed at the persons disqualified."

To like effect see *Cummings* v. *Missouri*, *supra*, at 320; *ex parte Garland*, 71 U. S. 333; *Trop* v. *Dulles*, 356 U. S. 86, 95, 96.

The Statute here in question is evidently aimed at the class of persons disqualified and not at the status from which the veteran is barred. On its face it punishes veterans for engaging in certain conduct. It expressly provides for forfeiture of veterans benefits on an administrative determination that the veteran is "guilty" of mutiny, treason, sabotage or rendering assistance to an enemy. The sole condition on which the forfeiture is based is the veteran's conduct. There is no relationship between this conduct and the circumstances and conditions pursuant to which the veteran is entitled to receive benefits. More par-

ticularly, in the case at bar, appellant's right to compensation of which he has been deprived and is being deprived is based on disability incurred by him during World War II while in the Armed Forces of the United States (38 U. S. C. 310). The grounds for forfeiture are also wholly unrelated to the veteran status or to the status from which he is barred. *Speiser* v. *Randall*, 357 U. S. 513, 527-528; *Cummings* v. *Missouri*, *supra*, at 319-320.

Speiser involved legislation requiring a claimant for veterans' property tax exemption to take an oath that he did not advocate the forcible overthrow of the Government of the United States or *support of a foreign government against the United States in the event of hostilities*, as a prerequisite to eligibility for such exemption.* The Court held (*supra*, at 518) that the disclaimer requirement constituted a penalty. It rejected the contention that the disclaimer requirement was relevant to the veteran status, stating (*supra*, at 528):

> "The State argues that veterans as a class occupy a position of special trust and influence in the community, and therefore any veteran who engages in the proscribed advocacy constitutes a special danger to the State. But while a union official or public employee may be deprived of his position and thereby removed from the place of special danger, the State is powerless to erase the service which the veteran has rendered his country; though he be denied a tax exemption, he remains a veteran. The State, consequently, can act against the veteran only as it can act against

* Compare the advocacy italicized above with the specific grounds on which the declaration of forfeiture here involved, was based

any other citizen, by imposing *penalties* to deter the unlawful conduct." (Emphasis supplied.)

The statutory purpose to punish is also clearly revealed in legislative history surrounding an amendment to the Forfeiture Statute here involved, 38 U. S. C. 3504, and 38 U. S. C. 3503 which provides for forfeiture for fraud.** The amendment, enacted on September 1, 1959, and now codified in 38 U. S. C. 3503 (d), in effect, repeals the application of both forfeiture statutes to veterans residing in the United States at the time of the commission of the offenses designated whose residence did not cease before the expiration of the period in which a criminal indictment for such offenses could be brought.***

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* The Court invalidated the legislation on the grounds that the procedures provided therein offended due process. It did not, therefore, reach the constitutionality of the substantive provisions of the legislation (*supra*, at 519-520). It should be noted that the Supreme Court of California construed the constitutional amendment on which the oath requirement was based as denying the tax exemption only to claimants who engage in speech which may be criminally punished consistent with the free speech guarantees of the Federal Constitution. This Court therefore said "for the purposes of this case we assume without deciding that California may deny tax exemptions to persons who engage in the proscribed speech for which they might be fined or imprisoned" (*supra*, at 519-520). As we show *infra* at pp. 19-24 the Forfeiture Statute as construed by the court below penalizes speech protected by the First Amendment.

** Legislative history is relevant and may be crucial in determining whether disabilities are penal or legitimately regulatory. *United States v. Lovett*, 328 U. S. 303, 313.

*** Section 3503(d) provides:

"After the date of enactment of this subsection, the forfeiture of benefits may be imposed under this section or section 3504 of this title upon any individual who was a resident of or

(Continued on following page)

The discussions at the House Subcommittee Hearing and the Senate and House reports on the proposed amendment plainly acknowledge that the purpose of both forfeiture statutes is to punish and that the forfeitures imposed constitute a penalty. *Hearings on Forfeiture of Veterans' Benefits, Special Subcommittee of the Committee on Veterans' Affairs, House of Representatives*, 86th Congress, First Session, H.R. 7601 (May 26, 1959); *Senate Report No. 661*, 86th Congress, First Session (August 14, 1959). Indeed the Veterans' Administrator in his report to the Senate Committee concerning the proposed amendment, characterizes the forfeiture provided for in both forfeiture statutes as "*in the nature of a criminal penalty*" and refers to it as "*additional to any penalty which may be imposed under the criminal code*" (*Senate Report No. 661, supra*, pp. 2-3). The Administrator further points out that "forfeiture is a permanent bar to benefits unless the guilty person is granted a Presidential Pardon (*ibid.* p. 2)." The discussion at the Committee Hearing was permeated with reference to the Forfeiture as "penalties" and "punishments" (*e.g. Hearing on Forfeiture of Veterans' Benefits, supra*, pp. 255, 275, 289-292). Similar reference to the forfeiture provisions were made in the Senate Report on the proposed amendments and in the Report of the House Committee as submitted to the Senate and embodied in the Senate report (*Senate Report No. 661*, pp. 2-3; 6-8). To merely illustrate,

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(Continued from preceding page)

domiciled in, a State at the time the act or acts occurred on account of which benefits would, but for this subsection be forfeited unless such individual ceases to be a resident of, or domiciled in, a State before the expiration of the period during which criminal prosecution could be instituted. This subsection shall not apply with respect to (a) any forfeiture occurring before the date of enactment of this subsection, or (b) any act or acts which occurred in the Philippine Islands prior to July 4, 1946."

the House Committee Report, as submitted to the Senate and embodied in the Senate Report states (*Senate Report No. 661, supra*, p. 8):

> "Generally speaking then it can be said that established national policy does not favor withholding benefits from persons, because they are unworthy according to our social and moral standards, *i.e.* conviction of criminal offenses. To do so is to provide unequal penalties for the same act."

All concerned, including the Veterans' Administrator, plainly regarded the forfeiture as a penalty, criminal in nature.

And finally it is significant that the Forfeiture Statute appears in Chapter 61, Title 38 under the chapter heading entitled "Penal and Forfeiture Provisions". This chapter plainly reflects the statutory scheme to impose punishment. It consists of only five sections, each of which provides for sanctions criminal or civil in form. These are Sections 3501 and 3502 which provide for criminal penalties for certain conduct; Section 3503 which provides for forfeiture for fraudulent statements pertaining to claims for benefits; 3504, the forfeiture statute in question and 3505 enacted in September 1959 which provides for forfeiture upon proof of conviction of certain specified offenses. The fact that the disability imposed under the forfeiture statute is civil in form does not avoid the constitutional infirmity of punishment without judicial trial. Since *Cummings*, it has been clear that deprivation of privileges, though civil in form, constitutes punishment within the meaning of the prescription against bills of attainder if the deprivation is aimed at the person or class of persons deprived and not at the activity or status from which the individual is barred. *E*

parte Garland, supra, United States v. *Lovett*, 328 U. S. 303; *Trop* v. *Dulles*, *supra* at 95-96.*

The court below relied on this court's decision in *Fleming* v. *Nestor*, 363 U. S. 603, to support its holding as to the non-punitive purpose of the Statute (Appendix "A", note, p. 48). But the case at bar is distinguishable in vital respects. In *Fleming* this Court held that the termination of payments of Social Security benefits to persons deported on certain specified grounds did not constitute punishment in the constitutional sense because it found that the Statute was not aimed at the conduct of the deportee but was aimed at effectuating the general purposes of the Social Security System of which the law is a part, namely the well being of the national economy. The Court expressly rejected the contention that the Statute was aimed at the conduct of the deportees. It noted that although the Statute provided for termination of payment to persons deported on certain specified grounds, the essential condition on which the termination of payments rested was not the grounds of deportation, but the fact of his deportation. In other words it did not rest on the conduct of the deportee but on the fact that the payments to a non resident would not contribute to the well being of the nations economy (*supra*, at 619-620).

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* The court below placed some stress in its decision on the fact that the sanction here involved is civil in form, relying on *Helvering* v. *Mitchell*, 303 U. S. 391 (Appendix "A", *infra*, p. 46). That case held that 50% addition to tax imposed with respect to deficiencies due to fraud did not constitute punishment so as to prevent, upon principles of double jeopardy, its assessment against one acquitted of tax evasion. The Court's decision in *Helvering*, however, rested on its finding that the purpose of the legislation was remedial and not punitive because it was designed to protect the revenue and to reimburse the Government for the heavy expense of the investigation and the loss resulting from the taxpayer's fraud (*supra* at 401).

Here, the sole condition on which the forfeiture may be based is the veteran's conduct, conduct which has no relevance to his status as a veteran or the circumstances under which the veteran's rights to benefits accrued. Here, unlike *Fleming*, there is no rational connection between the status barred and the statutory scheme of the Veterans' Benefits program. Here, there is no basis whatever for an alternative view to the view that the purpose of the Forfeiture Statute is to reach at the person. Moreover, unlike *Fleming*, where this Court noted "no affirmative disability or restraint is imposed" (*supra*, at 617), the Statute here, as construed and applied, imposes an affirmative disability and restraint "upon the use of speech and press" (Judge Fahy, dissenting, Appendix "A", *infra*, p. 53).

The court below places considerable reliance as to the non punitive intent of the Forfeiture Statute on its view of the benefits as a gratuity which Congress could grant or withhold in its discretion, stating: "among other matters the *Fleming* case holds that a denial of a non-contractual benefit is not punishment" (Appendix "A", *infra*, p. 48). But as we note above the holding of this Court on the question of punishment in *Fleming* does not turn on the nature of the benefit. It is based on a finding of a rational connection between the Act and the purposes of the Social Security program. Mr. Justice Brennan in his dissenting opinion in *Fleming*, *supra* so construed the majority opinion. He said (at 636):

> "I do not understand the Court to deny but for that connection Sect. 202 (n) would impose punishment and offend not only the constitutional prohibition on *ex post facto* laws but also violate the constitutional guarantees against imposition of punishment without a judicial trial".

Although we do not consider that the nature of the deprived compensation is decisive as to the question raised here, it should be noted that appellant's statutory right to compensation for service connected disability is no mere gratuity. Significantly Congress regarded payment for service connected disability as repayment of a debt owed to veterans who had suffered such disability, for in the Act of July 9, 1946, 60 Stat. 529, 38 U.S.C. 101 (13) it designated such payments as "compensation" to distinguish them from other benefits which it called "pensions" (38 U.S.C. 101 (15)). See also 96 Cong. Rec. remarks of Rep. Scrivener.

For all of the reasons advanced herein the Forfeiture Statute inflicts punishment without judicial trial. Hence it constitutes a bill of attainder and is invalid. *Cummings v. Missouri, supra; United States v. Lovett, supra.*

B. The Forfeiture Statute violates Article III Section 2, Clause 3 and the Sixth Amendment in that it inflicts punishment without judicial trial and trial by jury.

For the same reasons the Forfeiture Statute violates Article III, Section 2 and the Sixth Amendment. Article III, Section 2, Clause 3 requires that "the trial of all crimes, except in cases of impeachment, shall be by jury". And the Sixth Amendment requires that in all criminal prosecutions the accused shall enjoy certain procedural rights including the right to a public trial by an impartial jury. The imposition of punishment, though civil in form, without judicial trial and solely as a result of an administrative determination violates these requirements. *Wong Wing v. United States*, 163 U. S. 228; *Lipke v. Lederer*, 259 U. S. 557, 561-562; *Bailey v. Richardson*, 182 F. 2d 46, 54-55 (C. A. D. C., 1950), aff'd 341 U. S. 918; *Fleming v. Nestor, supra*, at 636 (Mr. Justice BRENNAN dissenting).

C. The Forfeiture Statute violates the Fifth Amendment.

The Forfeiture Statute violates due process in that it is arbitrary, unreasonable and discriminatory. It discriminates against veterans by singling them out for punishment for conduct as to which it does not similarly punish non-veterans. This discrimination is arbitrary and unreasonable because the grounds for punishment have no relationship to the veteran status, and hence provides no basis for singling veterans out for special punishment. The absence of a reasonable relationship of the Forfeiture Statute to the purposes and objectives of the Veterans' benefits program and to the circumstances and conditions under which the veteran's right accrues offends due process. *Nebbia v. New York*, 291 U. S. 502, 525.

II

The Forfeiture Statute as construed and applied violates the First and Fifth Amendments.

A. The Forfeiture Statute as construed and applied violates the First Amendment.

Appellee's agent, the Board, construed the phrase "rendering assistance to an enemy," on which the forfeiture of appellant's service connected disability compensation was grounded, as encompassing all acts which give "aid and comfort to the enemy" such as "*making a speech critical of Government or opposing its measures*, profiteering, striking in defense plants or essential work and the hundred other things which impair our cohesion and diminish our strength" (R. 35). (Emphasis supplied.) It derived this definition from this Court's definition of "aid and comfort to the enemy" in *Cramer* v. *United States*, 325 U. S. 1, 29. But unlike treason, where intent to betray is an additional element of the offense, the Board held that no intent to render aid need be shown. Nor need there be any showing of actual assistance to the enemy so long as the speech and writings or the conduct set forth in its definition "would naturally tend to be of assistance to the enemy" (R. 36). Thus, under the Board's view, speech critical of Government or opposing its measures in time of war unaccompanied by the intent to render assistance or conduct which converts the speech into criminal conduct constitutes rendering assistance to an enemy within the meaning of the Forfeiture Statute.

The court below similarly construed the Statute. It said (App. "A", *infra*, p. 52), "It is well settled that aid and assistance to the enemy may be extended in the form of verbal utterances alone", citing *Cramer* v. *United States*, 325 U. S. 1, 29; *United States* v. *Burgman*, 87 F. Supp. 568, 571, 88 U. S. App. D. C. 184; *Gillars* v. *United States*, 87

U. S. App. D. C. 16, 25; *Chandler v. United States*, 171 F. 2d 921, 938; *Iva Ikuko Toguri D'Aquino v. United States*, 192 F. 2d 338, 366. But the cases cited by the court below did not turn on the utterances alone. All required proof of an additional element to make the speech criminal.

If the phrase "rendering assistance to an enemy" may be construed, as it was by the Board and the court below, to penalize "speech critical of the Government or opposing its measures" then the Forfeiture Statute patently violates the First Amendment. Indeed such speech was the sole basis on which the forfeiture rested.

The Board affirmed the finding of guilt on the basis of "public utterances" which it summarized as follows in its opinion denying appellant's petition for reconsideration (R. 50-51).

> "The overt acts committed by Thompson after the inception of the Korean Conflict which were considered by the Board as warranting affirmation of the conclusion reached by the Committee on Waivers and Forfeitures may be particularized, in part, as follows: On or about September 18, 1950, Thompson declared and caused to be printed in the Daily Worker, an advertisement urging that 'Mass action NOW can still halt a Police State.' In an address to the 31st Anniversary Rally of the Communist Party at Madison Square Garden in September 1950 he declared: 'American imperialism is hiding behind the skirts of the Negro G.I. in Korea'; demanded 'withdrawal of the United States troops from Korea; urged 'defeat of the McCarran Bill'; advocated 'if the bill passed, it should be rendered ineffective by not registering under its provisions.' In a radio broadcast in October 1950, Thompson criticized 'the gigantic armament program and its cost'; asserted 'that it had cost more dearly in attacks on the Bill of Rights and democratic liberties,

in growing terror and lynchings against the Negro people, in vicious upsurge of anti-semitism and shameful attacks on the foreign born'; that the Truman get 'tough with Russia policy' means in the last analysis 'get tough with the American people'.

In December 1950 in a speech at the State Convention of the New York State Communist Party, he declared 'that the way of life of the working people of the State daily becomes more cruelly affected and more viciously warped with each war move of the Wall Street bankers and the Washington politicians'; referred to the 'war mobilization and militarization of the home front' the 'savage Truman-MacArthur war of aggression in Korea, 'and the avowed intention of the ruling class of our country to launch an atomic world war'; declared the 'strength of the peace movement is basically determined by the extent to which the working class is in motion on various fronts against the war policies of monopoly capital'; called for 'greater party unity in order to achieve in our party organization in New York State an ability to effectively execute the kind of concentration policy called for by the National Draft Resolution.'

Thompson, in urging execution of the policies set out in the National Draft Resolution, fostered and advanced the cause of foreign powers, including nations with which we were then at war, and it was so held in our decision of July 31, 1956. That decision contains detailed excerpts of the Resolution which was published in the Communist organ, 'Political Affairs'. The Resolution condemned our war efforts and our diplomatic achievements by vicious harangues, e.g., 'the United States support of the United Nations in the Korean Conflict constituted *armed intervention, armed aggression' and fiendish Lidices perpetrated by American hands.*' Our action with respect to Formosa

> was described as 'seizure of Formosa'. It was said therein that the United States 'seeks to destroy the national independence of its allies,' 'threatens aggression against Communist China,' seeks to subjugate the Chinese and all Asian peoples,' and has a 'mad dream to conquer and subjugate the entire world.' In contrast, the Resolution declared that the Soviet Union 'heads the camp of peace and democracy, blocking the drive of Wall Street imperialism toward complete world mastery.''

The identical evidence here involved was considered by the late Mr. Justice JACKSON, sitting as Circuit Judge, in an application for bail by appellant and his co-defendants in the *Dennis* case following affirmance of their convictions by the Court of Appeals. *Williamson* v. *United States*, 184 F. 2d 280.* In that case the Government urged, in support of its opposition to bail pending review by this Court, that the speeches and utterances (relied on by the Board in the instant case) indicate that "defendants while at large have pursued and will continue to pursue a course of conduct and activity dangerous to the public welfare, safety and national security of the United States" (*supra*, at 281). Justice JACKSON rejected this contention and held that the speech involved was protected by the First Amendment. Thus in commenting on this identical evidence, he said (at 283):

> "Turning then to past, but post conviction, activities said to be dangerous, I find them to consist entirely of making speeches and writing articles or editorials, chiefly for the Communist Party organ the *Daily Worker*. They do not contain any advocacy of violent overthrow of the Government and can only be said to be inciting, as all opposition speaking or writing that

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* The Board concedes that "similar utterances and writings" were considered by Mr. Justice JACKSON in *Williamson* v. *United States*, *supra* (R. 50).

undetermines confidence and increases discontent may be said to be incitement. These, however, are severely critical of the policy of the United States toward Korea and favorable to the Soviet position. Some are crudely intemperate, contain falsehoods obvious to the informed, all are plainly designed to embroil different elements of our society and embarrass those who are presently conducting the Government. But the very essence of Constitutional freedom of press and speech is to allow more liberty than the good citizen will take. The test of its vitality is whether we will suffer and protect much that we think false, mischievous and bad both in taste and intent.

It is not contended that these utterances, in themselves are criminal. The Communist Party has not been outlawed either by legislation, nor by these convictions, and its right to publish the Daily Worker is not questioned * * *. Since the party may lawfully be issued, certainly its publishers or contributors may comment critically on the Government's conduct of foreign affairs. If the Government cannot get at these utterances by direct prosecution, it is hard to see how courts can justifiably reach and stop them by indirection. I think courts should not utilize their discretionary powers to coerce men to forego conduct as to which the Bill of Rights leaves them free. Indirect punishment of free press or free speech is as evil as direct punishment."

To like effect see *Konigsberg v. State Bar of California*, 353 U. S. 252, 269.

Judge Fahy in his dissenting opinion found that the Forfeiture Statute as construed and applied raised "serious and delicate question of whether it violates the First Amendment." (Appendix "A", *infra*, p. 53).

> "The application of the language to the speech and writings of the plaintiff constitutes a direct penalty for, and restriction upon, the use of speech and press. This is obvious. The case is indistinguishable in this respect from *Speiser* v. *Randall*, 357 U. S. 513, 518.

> We are asked by the Administrator to hold that by the vague language he relies upon Congress intended this restriction on speech and press. So to hold would require us to decide the serious and delicate question whether the restriction violates the mandate of the First Amendment that 'Congress shall make no law . . . abridging the freedom of speech, or of the press . . .'."

To avoid constitutional doubts Judge Fahy declined to construe the Statute, as it was construed by the Board, as "an attempt by Congress to withdraw a veteran's First Amendment rights" and accordingly held that the forfeiture of appellant's service connected disability benefits, on the grounds assigned by appellee was unauthorized by Congress and invalid (Appendix "A", *infra*, p. 55).

B. As construed and applied the Forfeiture Statute is vague and indefinite in violation of the Fifth Amendment.

There is no guidance in the language of the Forfeiture Statute as to the conduct deemed by Congress to constitute the offense of "rendering assistance to an enemy". The phrase contains no standard of guilt. Indeed, the Board, in construing the import of that phrase reflects the wide and "difficult to delimit" range of activities which may be comprehended within its scope. Thus it said (R. 54):

> ". . . other offenses, not specifically designated, are included within the limits of a strict construction of the term 'rendering assistance to the enemy'. For example, at one extremity, it is easily conceived that acts of actual espionage during wartime would come within

the purview of generic offenses included therein; so also, acts of criminal anarchy and criminal syndicalism during wartime. True, at the other end of the scale, offensive activities *might become abstruse and difficult to delimit.*" (Emphasis supplied.)

A statute which does not fix an ascertainable standard of guilt and is inadequate to inform persons accused of the nature and cause of the accusation against them is void for vagueness and violates the due process requirements of the Fifth Amendment. *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81; *Connally* v. *General Construction Company*, 269 U. S. 385; *Winters* v. *New York*, 333 U. S. 507.

In addition to the general vagueness of the language and the "abstruse and difficult to delimit" scope of activities embraced within it, the Board further expanded its vagueness by the gloss it placed on the intent which it deemed sufficient to establish the offense. Thus, it held (R. 35-36):

> "We are not concerned with the question of whether, by means of such acts [i.e, 'including speech critical of Government or opposing its measures'] the veteran intended to betray his country and was guilty of treason * * * The question is whether the acts were done intentionally and whether the natural tendency and probable effect thereof would reasonably be expected to benefit the enemy."

On this view, there need be no intent to do that which the statute prohibits. There need only be the intentional doing of some undefined act, the natural tendency of which may benefit the enemy. Thus the inherent vagueness of the offense is compounded by the Board's failure to require a specific intent to do that which the Statute forbids. *Screws* v. *United States*, 325 U. S. 91, 101-102. Moreover, as construed by the Board, the Statute is so vague and indefinite

as to permit within the scope of its language punishment of incidents fairly within the protection of the guarantee of free speech. Cf. *Winters* v. *New York*, 333 U. S. 507, 509-510; *Herndon* v. *Lowry*, 301 U. S. 242, 258; *Stromberg* v. *California*, 283 U. S. 359, 369.

In commenting on the vagueness of the language as construed Judge Fahy said (Appendix "A", *infra*, p. 56):

> "The language here used not only does not mention speech or press, but is so general as to the type of conduct intended to be covered that serious doubts arise not only under the First Amendment but under the due process clause.
>
> "The contrary view would permit a forfeiture because of some indirect or remote assistance to an enemy thought by the Administrator, rather than specified by Congress, to arise from critical speech or writing. A forfeiture might occur should a veteran step over a line so vaguely drawn as to be indiscernible. As the Supreme Court in another connection recently stated, in *Greene* v. *McElroy*, 360 U. S. 475, 507:
>
> > "* * * explicit action, especially in areas of doubtful constitutionality, requires a careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.' "

III

The forfeiture is void because it is based on unauthorized grounds, on no substantial evidence and on procedures which violate the requirements of due process.

A. The forfeiture is based on unauthorized grounds.

Under principles of statutory construction adopted by this Court a statute is to be construed "narrowly to avoid constitutional doubts". *United States* v. *Harriss*, 347 U. S. 612, 623. And, as Judge Fahy stated in his dissenting opinion (Appendix "A", *infra*, pp. 53-54), "If the statutory language can be reasonably interpreted so as to avoid penalizing the use of speech and press that interpretation should be adopted so that the constitutional issue is not reached for decision".

To avoid the constitutional doubts raised by appellee's interpretation of the Forfeiture Statute, Judge Fahy, noting that the Statute did not expressly mention speech and writings, concluded that it did not comprehend "these modes of expression, used however critically, when unaccompanied by conduct which, considered with what is said or written, does not constitute a crime or at least does not render direct assistance to the enemy" (Appendix "A", *infra*, p. 54). Accordingly he held that the grounds assigned by appellee for the forfeiture was unauthorized by Congress.

In *Wellman* v. *Whittier*, 259 F. 2d 163 (C. A. D. C., 1958), a case involving the identical Statute here involved, the Veterans' Administrator construed the phrase "rendering assistance to an enemy" as "a general term which was intended to include all conduct knowingly performed during time of war under circumstances where the potential effect of such conduct, individually or as an *integral part* of other activity, contemporaneous or future, would be to serve the

interests of the enemy" (*supra*, at 166). The Veterans' Administrator included within this definition conspiracy to advocate the violent overthrow of the Government of the United States at a time when it was engaged in the Korean conflict. The Court in *Wellman* rejected this construction of the Forfeiture Statute noting that (*supra*, at 167-168):

> "The strict interpretation necessary as to so drastic a forfeiture statute * * * requires that it be limited in its application to the specific grounds spelled out by Congress with clear proof of the overt acts relied upon."

Judge DANAHER, who wrote the opinion for the Court in *Wellman*, after pointing out that he had been a member of the Senate Committee which reported out the Forfeiture Statute, said, in explaining the intent of Congress (*supra*, note 15, at 167-168):

> "At the very least 'overt acts' were essential * * * The Congress was alive to reports of possible sabotage, such as were associated with the landing of Nazi saboteurs in June 1942 from a Nazi submarine [see Cramer v. United States, 1945, 325 U. S. 1, 65 S. Ct. 918, 89 L. Ed. 1441]; the destruction of the Normandie in February 1942 [see Southern S.S. Co. v. National Labor Relations Board, 1942, 316 U. S. 31, 46, 62 S. Ct. 886, 86 L. Ed. 1246]; mutiny [see Id. 316 U. S. at page 43, 62 S. Ct. at page 892]; propaganda broadcasts by renegade personages, and similar conduct designed to give aid and comfort [Cramer v. United States, 325 U. S. at page 30, 65 S. Ct. at page 933] *and thus render assistance to the enemy.* Therein lay the genesis of 38 U. S. C. A. Sec. 728, as prepared by the Veterans' Administration, to reflect the will of Congress." (Emphasis supplied.)

For these reasons and to avoid the constitutional infirmities set forth in Point II *supra*, we urge that the ground on

which the forfeiture of appellant's service-connected disability compensation was based is unauthorized by the Forfeiture Statute.

We urge an additional reason in support of our contention that the ground of forfeiture applied to appellant was unauthorized. Unlike mutiny, treason and sabotage, the phrase "rendering assistance to an enemy" does not, in itself and as construed, set forth a criminal offense cognizable under our laws. We contend that Congress never intended that "rendering assistance to an enemy" constitute a separate ground in addition to "mutiny, treason and sabotage" on which to predicate forfeiture. Rather that phrase was intended as descriptive of the general nature of the offenses of mutiny, treason and sabotage. This appears to be the view of Judge DANAHER in *Wellman* as indicated in the quotation from his opinion set forth above. Thus, Judge DANAHER, after enumerating the kind of activity with which Congress was concerned at the time of the enactment of the Forfeiture Statute, all of which fall within the specific criminal offenses enumerated in the Statute, adds "*and thus render assistance to the enemy*".

Corroboration of this view is to be found in the amendments to the Forfeiture Statute adopted September 1, 1959 and now codified in 38 U. S. C. 3503 (d) and 3505. The statutory scheme of these amendments is to eliminate forfeiture based on administrative determinations of guilt and to ground forfeiture only on a judicial finding of guilt of specified offenses. Thus Section 3503 (d) repeals the Forfeiture Statute as to persons who resided in the United States during a period when indictments could be returned against them for the offenses specified therein. The repeal makes no exception of an unindictable offense of "rendering assistance to an enemy". This repeal was supplemented by Section 3505 which provides for forfeiture on proof of conviction of specified offenses, including mutiny, treason and sabotage as well as a series of other criminal of

fenses not previously included within the Forfeiture Statute. Certainly, if "rendering assistance to an enemy" was ever regarded as an independent but unindictable offense on which to ground forfeiture, some reference to this independent and unindictable offense would have appeared in the discussions of the proposed amendments. For it is unreasonable to assume that Congress eliminated this separate offense as a ground for forfeiture without any reference to or discussion of it. But that is the effect of the amendments.

It is plain from the foregoing that at no time did Congress intend to penalize a veteran under the Forfeiture Statute for conduct which did not constitute a criminal offense under our laws and hence the Administrator predicated forfeiture on unauthorized grounds.

B. There was no substantial evidence to support appellee's finding that appellant "rendered assistance to an enemy".

As we have shown herein the forfeiture was based on appellant's speech and writings. There was no evidence that appellant's speech and writings were intended to and actually did render assistance to an enemy. Indeed the test applied by the appellee made such proof unnecessary (R. 36). There was no evidence, as required in *Wellman*, that appellant's "activity * * * engendered a strike in war production plants or any similar interference said to have an effect obstructive to the war effort in Korea or elsewhere", or that his speeches and writings were "exercised among troops to the destruction of their morale or to an enlistment program" (*Wellman, supra*, at 166).

C. The forfeiture is void in that the procedures pursuant to which the forfeiture was determined and affirmed violate the requirements of due process.

As was pointed out in *Speiser* v. *Randall*, 357 U. S. 513:

> "When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which we value most highly and which are essential to the workings of a free society. Moreover, since only considerations of the greatest urgency can justify restrictions on speech, and since the validity of a restraint on speech in each case depends on careful analysis of the particular circumstances * * * the procedures by which the facts are adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford."

The proceedings pursuant to which appellant was deprived of his service connected disability compensation not only fail to meet the high standards required in cases involving restraints of speech but also were tainted throughout with violations of normal standards of procedural due process.

1. *The proceedings before the Committee.*

As we have shown herein, the Committee determined the forfeiture of appellant's benefits without notice of the specific charge or the nature of the evidence against him, and without hearing or opportunity to confront and cross examine the witnesses against him. In this respect the Committee violated fundamental requirements of due process. In addition the Committee imposed on appellant the burden of proving his innocence. For in its letter informing appellant of its intention to invoke the application of the Forfeiture Statute, the Committee invited him to establish his innocence of an unknown charge on unknown evidence. It stated (R. 60):

> "The purpose of this letter is to afford you the opportunity to submit any evidence which in your opinion

> might explain your position in the matter in order that it may be determined by this Committee as to whether you have violated the above quoted forfeiture statute."

Since the grounds of forfeiture involved the exercise of speech this imposition of the burden of proof on appellant also violates procedural due process, *Speiser* v. *Randall*, *supra*, at 528-529.

The court below held (Appendix "A", *infra*, p. 51) that "the fact that the hearing was granted to plaintiff at the appellate stage, instead of at the initial level is immaterial" quoting the following from *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 152:

> "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding, so long as the requisite hearing is held before the final order became effective."

But in *Opp Cotton Mills* the petitioner was accorded a hearing before the final order became effective.* In the case at bar the final order became effective before appellant was accorded a hearing. For the forfeiture went into effect as soon as the Committee's decision was handed down.* Ac-

* In *Opp Cotton Mills* petitioner complained of a denial of a hearing before a committee appointed by the Administrator of the Wage and Hour Division of the Department of Labor whose function was to recommend to the Administrator a minimum wage in a particular industry. The recommendation did not become effective until enacted into an order of the Administrator. Petitioner was accorded a hearing before the Administrator prior to the issuance of the order in question.

* Thus appellee's agent, Chief, Veterans' Claims Division informed appellant on May 5, 1955, that in accordance with the decision of the Committee "action has been taken to discontinue your [check], compensation effective June 26, 1950" (R. 141).

cordingly the subsequent hearing before the Board did not meet the requirements of due process stated in *Opp Mills, supra.* Moreover, the fact that appellant was afforded notice of the charges and of the evidence against him for the first time during the appellate process does not comply with the high standards of procedural due process required in cases involving restraints on the exercise of speech. For such proceedings imposed on appellant the burden of proof of error in the determination of the body of original jurisdiction, thus shifting the burden of proof to the appellant contrary to the ruling in *Speiser* v. *Randall, supra.*

2. *Proceedings before the Board.*

The hearing before the Board was similarly tainted with violation of procedural due process. Thus the hearing afforded appellant pursuant to the rules adopted by the Board was limited as follows (R. 13-14):

> "You will note that the purpose of a hearing before the board is primarily to receive for the record the contentions and oral arguments of the claimant. It is not an adversary proceeding or a trial in any sense. No adverse witnesses will be presented."

It may be urged that whatever prejudice inured to appellant, by virtue of the limited character of the hearing described above and the denial of opportunity to confront and cross examine witnesses, was remedied by the fact that the Board presumably acted upon evidence stipulated to by the parties. But this is not the fact. For the Board went outside of the record as stipulated and acted on evidence concerning which it gave appellant no notice. Thus in its opinion affirming the Committee's determination of forfeiture, the Board relied on certain "background information" which does not appear in the record as stipulated. It included such "background information" as attendance by appellant in courses in Marxism-Leninism in Moscow

in 1935; that appellant "fought in Spain with the Abraham Lincoln Brigade in 1937" and also certain positions held by appellant in the Young Communist League (R. 76). When pressed by appellant for reconsideration of its decision, the Board in its opinion affirming its prior decision, disclosed additional "background information" *not heretofore disclosed to appellant* concerning appellant's alleged Party activities since 1933, the nature of the Party, including the size of its membership, and appellant's alleged use of the Party (R. 44, 47).

Appellant was never given notice prior to the Board's decision that the nature of the Communist Party and its activities were deemed relevant to the issues involved in the forfeiture proceedings. Nor was there any indication that the Board had before it any evidence on this question or that it intended to rely on such evidence in disposing of appellant's appeal. This was no harmless consideration of undisclosed evidence. The Board's conclusion as to the alleged nature and size of the Communist Party and the nature of appellant's alleged use of the Party was a decisive factor in affirming the determination of forfeiture. Thus, the Board said (R. 49):

> "The adverse action of the Board was predicated upon his speeches and writings after June 27, 1950, together with his adroit employment, through his leadership and influence, of the nationwide framework of the Communist Party as the vehicle in effectuating the assistance to the enemy. It was the exhortation of this well-knit, rigidly disciplined membership located in countries, cities, towns, villages, and communities throughout the entire United States and the use of the nationally circulated daily newspaper, "The Daily Worker" and the monthly magazine, "Political Affairs," to spread the gospel of resistance to our war effort that gave impetus and effect to what might otherwise have been ineffective diatribes. It was

> these speeches and writings multiplied by the echoes of the thousands of the membership and their fellow travelers, that supplied the potent force and the dangerous effect * * * His use of the Communist Party, not his membership in that party, was considered by the Board in reaching the conclusion that Thompson had, beyond a reasonable doubt, rendered assistance to an enemy in violation of the forfeiture statute."

No part of the evidence on which the Board relied to support the conclusions stated above was ever made known to appellant.

It is no accident that the record assumed such elastic proportions. It was inherent in the nature of the proceedings afforded appellant. Failure to give him a hearing before the body of original jurisdiction provided opportunity for a record of evidence against him never fully disclosed to him, and a consideration of issues never made known to him. This opportunity for procedural violations was further extended by the limited character of the non-adversary hearing eventually accorded appellant. It did not provide for a record fixed by the parties but allowed the Board to dip into undisclosed information from undisclosed sources and to consider issues concerning which appellant was given no opportunity to be heard.

Assuming, arguendo, the validity of the Forfeiture Statute on its face and as construed and applied appellant was entitled to a full hearing in adversary proceedings with opportunity to be heard on all of the evidence against him, full notice of the issues involved with opportunity to be heard thereon, and the right to have the issues decided upon a fairly established record concerning which he had full notice. The deprivation of these procedural safeguards violates due process. *Morgan* v. *United States*, 304 U. S. 1, 14-20; *Greene* v. *McElroy*, 360 U. S. 474, 496-497.

Appellee, in its construction and application of the Forfeiture Statute, vests in himself the broad and unlimited authority to control and penalize veterans for their political beliefs and affiliations. In the case at bar, the record makes plain that appellant was penalized because appellee does not approve of his political beliefs and affiliations. Indeed it leaves the distinct impression that appellee was determined to invoke forfeiture of appellant's benefits for this reason and then tailored the record to justify its actions. Thus assumption of power and the procedural violations which accompanied its exercise finds no warrant in law. And in view of appellant's outstanding service record, the declaration on such proceedings that he rendered assistance to any enemy offends civilized concepts of justice and decency.

IV

Appellee's declaration of forfeiture is subject to judicial review.

A majority of the court below held that 38 U.S.C. 211 (a) which precludes judicial review of a decision by the Veterans' Administration "on any questions of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration" barred judicial review of the Administrator's decision declaring appellant's service connected disability compensation forfeited. This holding and construction of the effect of 211 (a) on the reviewability of a decision rendered by the Administrator pursuant to the Forfeiture Statute is in conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Whitaker* v. *Whitten*, 259 F. 2d 163. In that case the Administrator contended that 211 (a) precluded review of the Administrator's action taken under the Forfeiture Statute here involved. The Court rejected this contention. It said (at 165-169):

"Here, it will be noted, Congress accorded finality to decisions concerning dates, a term which is thoroughly understood and correctly defined. We have repeatedly recognized that nonreviewability must be accorded to the Administrator's decisions as to claims. But we are not here concerned with a 'claim' by a veteran, but with action by the Administrator working the forfeiture of an already adjudicated award.

We cannot doubt that ample and substantial grounds dictated the congressional intention that a veteran's service connected disability compensation was not to be forfeited by virtue of an unreviewable decision in the agency that a veteran was guilty of so serious an offense as treason or rendering assistance to the enemy in time of war. Moreover, we are entirely satisfied that Congress recognized that there is a very real distinction between a decision as to *action* initiated by a veteran and a decision by the Administrator as to action commenced by *him* under 38 U.S.C.A. Sec. 728. Clearly, it is not every action by the Administrator which has been accorded by Congress the status of nonreviewability."

The decision in *Hoffman* is controlling here. The jurisdictional facts in this case are identical with the facts in *Hoffman*. The action by the Administrator complained of and the statutory authority pursuant to which he purported to act are identical in both cases. In addition, even as

suming that 211 (a) applies to judicial review of the Administrator's action under the Forfeiture Statute it is the general rule that no legislative prohibition against judicial review will avail where the administrative determination exceeded its authority or rested on an unconstitutional statute. *Harmon* v. *Brucker*, 355 U. S. 579. In that case this Court held, despite the existence of a finality statute, that the district court had jurisdiction to entertain a suit for a declaratory judgment against the Secretary of the Army where the Secretary's action exceeded the powers granted him by Congress. The Court said (at 581-582):

> "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers * * *. The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his actions would not constitute exercise of his administrative discretion, and, in such circumstances as those before us, judicial relief from this illegality would be available."

CONCLUSION

For the foregoing reasons, it is submitted that the questions presented by this appeal are substantial and that probable jurisdiction should be noted.

Respectfully submitted.

MARY M. KAUFMAN,
Attorney for Appellants.

APPENDIX "A"

Opinion

(Filed—June 29, 1960)

Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT

For the District of Columbia

Civil Action No. 1853-59

Robert G. Thompson

Plaintiff,

v.

Sumner G. Whittier,
Administrator of Veterans Affairs,

Defendant.

Mary M. Kaufman, of New York, N. Y.; and Joseph Forer, of Washington, D. C., for the plaintiff.

Cecil R. Heflin, Homer H. Kerr, Jr., and Oran H. Waterman, of the Department of Justice, Washington, D. C., for the defendant.

Before Fahy, Circuit Judge, and Holtzoff and Keech, District Judges.

Holtzoff, District Judge.

The plaintiff, Robert G. Thompson, is a veteran of World War II, who was in receipt of compensation from the Veterans Administration for a service connected disability. The Veterans Administration terminated the payments on the authority of 38 U.S.C. 3504, on the basis of a finding that

he had aided an enemy of the United States during the Korean Conflict. This action is brought for the purpose of setting this ruling aside on the alleged ground that the foregoing statute is unconstitutional, as well as on the alleged grounds that the Administrafor misconstrued the statute; that the procedure followed by him was lacking in due process of law; and that his finding of fact is not sustained by substantial evidence. Inasmuch as a question of constitutionality of an Act of Congress was raised, this three-judge court was convened.[1] Both parties moved for summary judgment and the case is now before the court on these cross-motions. We uphold the constitutionality of the statute and sustain the decision of the Veterans Administration.

The following undisputed facts appear from the papers attached to the motions and the rulings of the various agencies of the Veterans Administration. The plaintiff served in the United States Army from November 28, 1941 to August 23, 1943, when he was honorably discharged. During his term of service he received the Distinguished Service Cross. He was awarded compensation by the Veterans Administration for pulmonary tuberculosis, which was found to be service connected. On October 14, 1949, he was one of a number of defendants who were convicted in the United States District for the Southern District of New York on a charge of knowingly and wilfully conspiring to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence. This conviction was affirmed by the Court of Appeals for the Second Circuit, *United States* v. *Dennis*, 183 F. 2d 201; and later by the Supreme Court, *Dennis* v. *United States*, 341 U. S. 494. The decision of the Supreme Court was rendered on June 4, 1951. Early in July, 1951, when the plaintiff was under an order to sur-

[1] 28 U.S.C. §2282.

render to serve his sentence, he disappeared, became a fugitive, and remained in hiding until he was found and taken into custody a couple of years later. In view of the fact that his whereabouts were unknown, no compensation was paid him subsequently to June 30, 1951."

On April 29, 1955, after the plaintiff had been apprehended, the Central Committee on Waivers and Forfeitures, an agency of the Veterans Administration, determined that the award of compensation to the plaintiff should be set aside on the ground that he had aided an enemy of the United States during the Korean Conflict. Pursuant to the prescribed procedure the plaintiff appealed to the Board of Veterans Appeals, which was an appellate agency within the Veterans Administration. In accordance with his request, a full hearing was accorded to him by the Board. A summary of the evidence against him was submitted to him in advance of the hearing. He was granted an opportunity to introduce evidence and to present an argument and a brief. In effect, the proceeding before the Board of Appeals was a trial *de novo*. On July 31, 1956, the Board affirmed the prior action of the Committee in a lengthy and comprehensive opinion. Subsequently the plaintiff requested a reconsideration, which was denied on May 5, 1959, again in a detailed opinion. The Veterans Administration, while setting aside the award of compensation to the plaintiff, apportioned and allocated to the plaintiff's dependent wife and children for direct payment to them, an appropriate portion of the amount previously paid to him.

In brief the evidence on which the Committee and the Board acted, showed that the plaintiff had joined the Communist Party in 1933 and became a member of various groups within the party. In August 1935, he went to Russia as an adviser to the Sixth World Congress of the Young Communist International Congress and remained there for over a year, working as a machinist and attending lectures and courses in Marxism-Leninism. In January 1937, he fought with the International Abraham Lin-

coln Brigade of the Spanish Republic Army. He returned to the United States in 1938 and became the State Secretary of the Young Communist League at Columbus, Ohio, and later a national vice president of the Young Communist League. In 1941, he transferred his activities to New York City, where he worked for the Young Communist League, until he entered the armed forces. After his discharge from the military service, he became national secretary of the Young Communist League, and a contributor to "the Daily Worker",—a publication of the Communist Party. He was an active member of various organizations within the Communist Party. As above stated, he was convicted in the Southern District of New York, on a charge of violating the Smith Act, and this conviction was affirmed first by the Court of Appeals for the Second Circuit, and then by the Supreme Court. After July 2, 195', he avoided apprehension for over two years and was finally arrested on August 27, 1953, in California.

The evidence of plaintiff's activities prior to the beginning of the Korean Conflict, which commenced on June 27, 1950, was considered by the Veterans Administration solely as casting light upon the plaintiff's intent in committing the specific acts subsequently to June 27, 1950, on the basis of which the award of compensation was vacated. These activities consisted of various speeches made by the plaintiff at meetings and conventions of Communist organizations during the Korean Conflict. These statements were designed to weaken and hinder the military and economic efforts of this country. Among these utterances were the following: that "mass action now can still halt a Police State"; that "American imperialism is hiding behind the skirts of the Negro GI in Korea"; a demand for the withdrawal of the United States troops from Korea; criticism of the "gigantic armament program" and its costs; an assertion that "the Truman 'get tough with Russia policy' means in the last analysis get tough with the American

ople"; that "the way of life of the working people * * *
ily becomes more cruelly affected and more viciously
arped with each war move of the Wall Street bankers
d the Washington politicians"; references to the war
fort of the United States as "the savage Truman-Mac-
rthur war of aggression" in Korea; as well as similar
terances.

The pertinent statutory provisions are as follows: 38
S.C. §310:

> "For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is the result of the veteran's own wilful misconduct."

U.S.C. §3503 (a):

> "(a) Whoever knowingly makes or causes to be made or conspires, combines, aids, or assists in, agrees to, arranges for, or in any way procures the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, concerning any claim for benefits under any of the laws administered by the Veterans' Administration (except laws pertaining to insurance benefits) shall

For facility of reference the citations are to the 1958 Supplement of the [illegible] to the earlier section numbers. [illegible] various statutory provisions is substantially the same as [illegible]

forfeit all rights, claims, and benefits under all laws administered by the Veterans' Administration (except laws pertaining to insurance benefits).

38 U.S.C. §3504 (a) and (b):

"(a) Any person shown by *evidence satisfactory to the Administrator* (to) be guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or of its allies shall forfeit all accrued or future gratuitous benefits under laws administered by the Veterans' Administration.

"(b) The Administrator, in his discretion, may apportion and pay any part of benefits forfeited under subsection (a) to the dependents of the person forfeiting such benefits. No dependent of any person shall receive benefits by reason of this subsection in excess of the amount to which he would be entitled if such person were dead." (Emphasis supplied.)

It is contended by the plaintiff that Section 3504 is repugnant to the Constitution in that it is a bill of attainder and an *ex post facto* law; that it is lacking in due process of law; and that it fails to formulate a definite standard of guilt. These contentions are predicated on the major premise that the result contemplated by Section 3504 is additional punishment for the offenses to which it refers. On the other hand, it is argued by counsel for the Government that this provision merely sets forth additional qualifications for eligibility to receive gratuitous payments from the Government, and does not involve any penalty or punishment.

The basic question to be determined on this aspect of the case is, therefore, whether a discontinuance of compensation for any of the causes enumerated in Section 3504, constitutes punishment or is to be regarded as failure to qualify for the receipt of the gratuity. In support of

their position that it is to be deemed punishment, counsel for the plaintiff point to the use of the word "forfeit" in the text of the statute. The matter, however, may not be disposed of in this manner. Substantial rights may not be immolated on the altar of semantics. They may not be determined on the basis of precision in the use of terminology or felicity in the choice of words. The question is to be resolved on the basis of the purpose of the statute and the intent of Congress. This is particularly true in this instance since "forfeiture" is not a word of art. It may have any one of several meanings and its exact significance depends on the context in which it is used or on the connection in which it is employed. Under some circumstances the term "forfeiture" may mean a punishment or penalty; under other conditions it may be used in a purely remedial sense as a loss or deprivation resulting as a consequence of specified activities or events.

The latest and one of the most explicit discussions of this point is to be found in an opinion of Chief Justice Warren in *Trop* v. *Dulles*, 356 U. S. 86, 95 *et seq.*:

> "Each time a statute has been challenged as being in conflict with the constitutional prohibition against bills of attainder and *ex post facto* laws, it has been necessary to determine whether a penal law was involved, because these provisions apply only to statutes imposing penalties. In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal

effect. The controlling nature of such statutes norm
depends on the evident purpose of the legislative.
point may be illustrated by the situation of an orig
felon. A person who commits a bank robbery, for
stance, loses his right to liberty and often his righ
vote. If, in the exercise of the power to protect ba
both sanctions were imposed for the purpose of pun
ing bank robbers, the statute authorizing both pen
ties would be penal. But because the purpose of
latter statute is to designate a reasonable ground of
gibility for voting, this law is sustained as a nonp
exercise of the power to regulate the franchise."

In *Helvering* v. *Mitchell*, 303 U. S. 391, 399-400, in
opinion written by Mr. Justice Brandeis, the Supreme C
held that penalties for fraud under the income tax la
constitute an additional remedy, rather than a crim
sanction. In discussing this subject, the Court said
stated:

"The question for decision is thus whether [303 U.S.
poses a criminal sanction. That question is one of st
tory construction.

"Remedial sanctions may be of varying types. O
which is characteristically true of the punitive crimi
element is revocation of a privilege voluntarily grant
"Forfeiture of goods or their value and the [illegible]
of fixed or variable sums of money are other sanctio
which have been recognized as enforcible by civil p
ceedings since the original revenue law of 1789.
of July 31, 1789, c. 5, 36, 1 Stat. 29, 47. In spite
their comparative severity, such sanctions have be
upheld against the contention that they are essentia
criminal and subject to the procedural rules governi
criminal prosecutions."

In *Davis* v. *Benson*, 133 U. S. 333, 347, the Court h
before it for consideration a statute of the Territory

Idaho, which excluded from the privilege of voting, or of holding any office of honor, trust or profit, any person who was convicted of certain felonies, as well as any person who advocated resistance to the laws of the Territory, or justified or approved the commission of crimes forbidden by it. The Court construed the statute as simply excluding the specified classes of persons from the privilege of voting or of holding office, and held that the Act was not open to any objection on constitutional grounds.

In *United States* v. *Lovett*, 328 U. S. 77, 79, it was held that a statute imposing a forfeiture of a soldier's pay on the ground of desertion was not a punishment, and the fact of desertion did not have to be established by the finding of a court martial, but might be determined administratively. This ruling was followed in *United States* v. *Kissinger*, 138 U. S. 87, 91.

It follows that the use of the term "forfeiture" is not determinative of the question whether Section 2504 provides punishment or prescribes an additional qualification for the award of compensation. The matter depends upon the intention of the Congress. It must be borne in mind that we are dealing with a gratuity or a gift. It is not an annuity to which the veteran has contributed or insurance for which he has paid premiums. The Congress obviously has it within its power to grant or withhold gratuities in its discretion. It determined to pay such a gratuity to veterans suffering from a service connected disability, but it made an exception as against such veterans as were guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States. It was natural that Congress would withhold gratuities from persons whose activities might undermine the very existence of the government of the United States. While it is far from conclusive, nevertheless the circumstance that this Section was included by Congress in the Title of the Code relating to "Veterans' Benefits," rather than in the Criminal Code, is some indication of legislative intent that the provisions of Section

3504 should not be deemed as imposing an additional punishment for the offenses therein enumerated.

We are of the opinion, therefore, that Section 3504 does not seek to impose punishment, but merely prescribes an additional qualification for eligibilty to receive a gratuity.

The authorities on which the plaintiff relies are distinguishable. *Cummings* v. *The State of Missouri*, 71 U. S. 277, and *Ex parte Garland*, 71 U. S. 333, involved statutes that barred persons from practicing certain professions or pursuing specified occupations, unless they took an oath to the general effect that they had not participated in any armed hostility against the United States or manifested adherence to the cause of any enemy of the United States, foreign or domestic, or had any sympathy with those engaged in rebellion. The statutes in question had been enacted during the Reconstruction era after the Civil War. Manifestly there is a vast distinction in principle between barring a person from earning a livelihood in his chosen endeavor and refusing to pay him a discretionary gratuity out of Government funds.

Speiser v. *Randall*, 357 U. S. 513, involved a California statute which granted certain tax exemptions to veterans, but required them, in order to secure the benefit of the exemption, to take an oath that they had not advocated the overthrow of the Government by force or violence, or by other unlawful means. The statute was held unconstitutional purely because of what was deemed by the Supreme Court a vital procedural defect, in that it construed the measure as placing the burden of proof on the claimants to the exemption. The Supreme Court did not hold that it was unconstitutional to deny the tax exemption to those veterans

* Additional support for that conclusion is lent by the decision of the Supreme Court in *Flemming* v. *Nestor*, decided June 20, 1960, subsequently to the preparation of this opinion. Among other things, the *Flemming* case holds that "a denial of a noncontractual governmental benefit" is not punishment.

who refused or who were unable to take the required oath.

We conclude, therefore, that 38 U.S.C. 3504 is constitutional and valid.

It is further urged by the plaintiff, however, that even if the statute is not repugnant to the Constitution, the Veterans Administration misconstrued the Act; that the procedure provided by it was lacking in due process; and that the conclusion of the Board is not supported by the evidence.

At the threshold, however, the plaintiff is confronted by the contention of the Government that the action of the Administrator of Veterans Affairs is final and is not subject to review. This contention is based on 38 U.S.C. 211 (a), which reads as follows:

> "(a) Except as provided in sections 784, 1661, 1761, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision."

It is well settled that the Government may not be sued without its consent and that, therefore, it is under no obligation to accord a judicial remedy in respect to claims against itself. Therefore, statutes either denying or withdrawing judicial remedies against the United States in respect to claims against it are constitutional. *Lynch* v. *United States*, 292 U. S. 571. *A fortiori* this must be true in respect to gratuities and grants. Thus in *Van Horne* v. *Hines*, 74 App. D. C. 214, 216, Groner, C. J. wrote as follows:

> "There can be no doubt that veterans' benefits are gratuities and establish no vested rights in the recipi

ent. * * * And this being so, such benefits may be withdrawn at any time by act of Congress, and to make the withdrawal effective, Congress may in turn withdraw jurisdiction from the courts over decisions of the Administrator in relation thereto."

* * * * * * *

"And this brings us to the single question, whether the act on its face shows that Congress meant to withdraw from the jurisdiction of the courts every final decision of the Administrator in relation to benefit payments in the nature of gratuities provided for under the act. We think this unmistakable intent is shown by the language of the act, and that the plain meaning of the words used bring us necessarily to this result, for the language is that the court shall not consider or review questions of law or fact 'concerning the claim for benefits or payments'. The words—concerning a claim for payments—can have no other meaning than—having relation to—such payments, and whatever the language of the prayer of the present complaint, the obvious purpose of the suit is to require the Administrator to resume benefit payments to appellant which the Administrator has decided appellant has forfeited all right to." * * *

The following cases hold to the same effect: *Balon* v. *Gray*, 92 U. S. App. D. C. 188; *Sinlao* v. *United States*, 271 F. 2d 846; *Magnus* v. *United States*, 234 F. 2d 673.

This provision is equally applicable to decisions terminating, discontinuing, or declining to renew payments as it is to original decisions on claims for compensation. *Van Horne* v. *Hines*, *supra*; *Sinlao* v. *United States*, *supra*.

[illegible] entirely different principle governs in cases in which the United States is the claimant and seeks affirmative relief by way of [illegible] repayment. *Tsoutsouris* v. *United States*, decided by this Court [illegible] 25, 1964) [illegible] F. Supp.

The conclusion is inescapable that the governing statute bars judicial review of the action of the Veterans Administration in this instance, and we so hold.

Assuming, however, *arguendo*, that the decision of the Veterans Administration was subject to judicial review, we would reach the following conclusions.

Section 3504 comprehends four different grounds for denying or discontinuing the payment of gratuitous benefits to a veteran, i.e., a finding on evidence satisfactory to the Administrator that the veteran has been guilty of mutiny; that he has been guilty of treason; that he has been guilty of espionage; or that he has been guilty of rendering assistance to any enemy of the United States or its allies. It should be observed that the statute is phrased in the disjunctive and not conjunctive. In this instance, the Administrator on evidence satisfactory to him found that the veteran had rendered assistance to an enemy of the United States during the Korean Conflict.

The procedure pursued by the Veterans Administration was proper and in accordance with the formula enunciated by the Supreme Court in *Morgan v. United States*, 304 U. S. 1, 18-19. A full hearing was accorded to the plaintiff. He was given notice of the claims and contentions of the Government with a detailed summary of the evidence supporting them, and was accorded an opportunity to meet them and present evidence and argument. The Constitutional requirement of confrontation with witnesses is limited only to criminal cases. The fact that the hearing was granted to the plaintiff at the appellate stage, instead of at the initial level is immaterial. Mr. Justice Stone in *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 152, stated:

> "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective."

The findings of fact and the conclusions of law made by the Veterans Administration are fully supported by substantial evidence. It is well settled that aid and assistance to the enemy may be extended in the form of verbal utterances alone, as was the case in this instance. *Cramer* v. *United States*, 325 U. S. 1, 29; *United States* v. *Burgman*, 87 F. Supp. 568, 571, 88 U. S. App. D. C. 184; *Gillars* v. *United States*, 87 U. S. App. D. C. 16, 25; *Chandler* v. *United States*, 171 F. 2d 921, 938; *Iva Ikuko Toguri D'Aquino* v. *United States*, 192 F. 2d 338, 366.

In the light of the foregoing discussion, the defendant's motion for summary judgment is granted; and the plaintiff's cross-motion is denied.

Keech, J., concurs.

June 27, 1960.

Fahy, *Circuit Judge, dissenting*: Plaintiff is a veteran who was receiving disability compensation for pulmonary tuberculosis connected with his military service during World War II, when the Soviet Union was our ally. For heroism the United States awarded him the Distinguished Service Cross. When we entered the Korean conflict he became highly critical and abusive of our participation. I think it is fair to say he became by speech and writings a protaganist of the communist position regarding Korea, in opposition to the policy of the United States, the United Nations and the Free World in general.

As a result the Administrator of Veterans Affairs decided that plaintiff had forfeited the disability benefits he had been receiving. The Administrator asserted as authority to do this the statute, set forth in the majority opinion, which at that time provided for forfeiture by a veteran of disability benefits upon a "showing" satisfactory to the Administrator that the veteran had been "guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of

the United States or of its allies * * *" 38 U.S.C. §3504 (1958).

The Administrator did not find plaintiff guilty of mutiny, treason or sabotage, nor did his decision rest upon plaintiff's previous conviction under the Smith Act. In the case of another veteran the Court of Appeals for this Circuit had strongly intimated that a Smith Act conviction could not be the basis for forfeiture, that Act containing its own penalties. *Wellman* v. *Whittier*, 104 U. S. App. D. C. 6, 259 F. 2d 163, opinion by Judge Danaher. The finding against the present plaintiff was that by speeches and articles he had been guilty of "rendering assistance to an enemy of the United States." I assume that this language describes an independent category of conduct and is not simply a modifying description of the immediately preceding categories of "mutiny, treason, sabotage."

The application of the language to the speech and writings of the plaintiff constitutes a direct penalty for, and restriction upon, the use of speech and press. This is obvious. The case is indistinguishable in this respect from *Speiser* v. *Randall*, 357 U. S. 513, 518.[1]

We are asked by the Administrator to hold that by the vague language he relies upon Congress intended this restriction on speech and press. So to hold would require us to decide the serious and delicate question whether the restriction violates the mandate of the First Amendment that "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *." If the statutory language can be reasonably interpreted so as to avoid

[1] "To deny an exemption [there a tax exemption to veterans] to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech." *Speiser* v. *Randall*, supra, at 518.

penalizing the use of speech and press that interpretation should be adopted so that the constitutional issue is not reached for decision. Though not to be construed so as to destroy its effectiveness, a statute is to be construed "narrowly to avoid constitutional doubts.", *United States* v. *Harriss*, 347 U. S. 612, 623.

> " " what Congress has written, we said through Mr. Chief Justice (then Mr. Justice) Stone, "must be construed with an eye to possible constitutional limitations so as to avoid doubts as to its validity." *Lucas* v. *Alexander*, 279 U. S. 573, 577. As phrased by Mr. Chief Justice Hughes, "if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U. S. 22, 62, and cases cited.
>
> *United States* v. *Rumely*, 345 U. S. 41, 45.

In contract with the statute involved in *Flemming* v. *Nestor*, U. S. ....., decided June 20, 1960, the language relied upon by the Administrator here is indefinite. It does not mention speech or writings. It can well be construed not to apply to these modes of expression, used however critically, when unaccompanied by conduct which, considered with what is said or written, does not constitute a crime or at least does not render direct assistance to the enemy. *Gillars* v. *United States*, 87 U. S. App. D. C. 16, 182 F. 2d 962, held that speech as there used was not protected by the First Amendment since it constituted an element of the crime of treason. A construction which limits the restriction before us to comparable situations—that is, to situations where speech or writing is punishable or prohibitable without raising a serious issue under the First Amendment—is plainly indicated. See *Speiser* v. *Randall*, *supra* at 519-20. *Cf. Roth* v. *United States*, 354 U. S. 476, 482-85.

The language relied upon appears in immediate conjunction with "mutiny, treason, sabotage." I am not willing to hold that in this context Congress provided that a veteran receiving disability benefits could not criticize the Government's participation in a war. The grant by Congress of disability compensation to a veteran is not to be construed as an attempt by Congress to withdraw a veteran's First Amendment rights. The Administrator, not Congress, has applied the language to speech and writings unaccompanied by direct assistance or criminal conduct. Of course the Administrator has done this in the belief Congress has authorized it. But I think this belief is a mistaken one. For under the decisions of the Supreme Court I cannot ascribe to Congress a deliberate penalization of the spoken or written word in the absence of much clearer language to show a purpose to do so. The language here used not only does not mention speech or press but is so general as to the type of conduct intended to be covered that serious doubts arise not only under the First Amendment but under the Due Process Clause.

The contrary view would permit a forfeiture because of some indirect or remote assistance to an enemy thought by the Administrator, rather than specified by Congress, to arise from critical speech or writings. A forfeiture might occur should a veteran step over a line so vaguely drawn as to be indiscernible. As the Supreme Court in another connection recently stated in *Greene v. McElroy*, 360 U. S. 474, 507:

> "... explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

The subsequent history of the provision fortifies me in the view that the language is not applicable to speech or writing unaccompanied by more direct assistance to an enemy. The Administrator himself played a commendable part in this history by his communications to those Members of Congress, Senator Harry F. Byrd of Virginia, and Representative Olin E. Teague of Texas, who were in charge of amendments to the statute. The amendments enacted in 1959 have the effect, prospectively, in the case of a veteran who, like plaintiff, is a resident of or domiciled in a State when the acts relied upon for forfeiture occur, of permitting forfeiture only upon conviction of specified crimes. 38 U.S.C. §§3503(d), 3505 (Supp. I, 1959); H.R. Rep. No. 420, 86th Cong. 1st Sess. (1959); S. Rep. No. 664, 86th Cong. 1st Sess. (1959).

For the reasons set forth in the opinion of our Court of Appeals in *Wellman* v. *Whittier, supra*, I think the court has jurisdiction to review the administrative action in this case; and for the reasons above indicated I think the veteran is entitled to a judgment declaring the forfeiture of his service-connected disability benefits, on the grounds assigned by the Administrator, to have been unauthorized by Congress and, therefore, invalid.

I have given my views on the merits because the three-judge court has taken jurisdiction, but under *Flemming* v. *Nestor, supra*, it appears the case is one for decision by a single District Judge.

Order

(Filed—June 29, 1960)

HARRY M. HULL, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 1853-59

ROBERT G. THOMPSON,

Plaintiff,

v.

SUMNER G. WHITTIER,
Administrator of Veterans Affairs,

Defendant.

This cause having been heard on the plaintiff's motion for summary judgment and the defendant's cross-motion for summary judgment, and the Court sitting as a three-judge District Court having considered the entire record, the pleadings, affidavits, exhibit's and memoranda of points and authorities filed herein, and there having been a full and complete hearing and the Court having found that there is no genuine issue as to any material fact and that the defendant in accordance with the opinion of the Court, dated June 27, 1960, is entitled to judgment as a matter of law, it is therefore, by the Court this 29th day of June, 1960:

ORDERED that the plaintiff's motion for summary judgment be, and the same hereby is denied, and it is

FURTHER ORDERED that the defendant's cross-motion for summary judgment be, and the same hereby is granted; and that the complaint be, and the same hereby is, dismissed with costs to the defendant.

s/ HOLTZOFF
Judge

s/ KRECH
Judge

Seen:

s/ JOSEPH FORER,
Attorney to Plaintiff.

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No. 500

In the Supreme Court of the United States

OCTOBER TERM, 1960

ROBERT G. THOMPSON, APPELLANT

v.

SUMNER G. WHITTIER, ADMINISTRATOR OF VETERANS' AFFAIRS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS

J. LEE RANKIN,
Solicitor General,
J. WALTER YEAGLEY,
Assistant Attorney General.
KEVIN T. MARONEY,
ROBERT L. KEUCH,
Attorneys,
Department of Justice, Washington 25, D.C.

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OPINION BELOW

The opinion of the District Court is reported at 185 F. Supp. 306 and is set forth as Appendix "A" to the Jurisdictional Statement.

JURISDICTION

Suit was instituted under 28 U.S.C. 1331, 28 U.S.C. 2201, and Sec. 10 of the Administrative Procedure Act, 5 U.S.C. 1009, to review a decision of the Administrator of Veterans' Affairs forfeiting the payment of monthly disability benefits under Section 4, Public Law 144, 78th Congress (former 38 U.S.C. (1952 ed.) 728, now 38 U.S.C. 3504). A three-judge court was convened in response to appellant's appli-

cation under 28 U.S.C. 2282 and 2284 (R. 105). The final order of the District Court granting appellee's motion for summary judgment was entered on June 29, 1960 (J.S., App. A). A notice of appeal to this Court was filed in the District Court on August 25, 1960 (R. 102). Appellant seeks to invoke the jurisdiction of this Court under 28 U.S.C. 1253.

STATUTES INVOLVED

Public Law 144, Section 4, 78th Congress (former 38 U.S.C. 728, now 38 U.S.C. 3504), is set forth at page 2 of the Jurisdictional Statement.

Act of June 25, 1948, ch. 646, Section 1253, 62 Stat. 928, 28 U.S.C. 1253, provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Act of June 25, 1948, ch. 646, Section 2282, 62 Stat. 968, 28 U.S.C. 2282, provides in relevant part:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges * * *

STATEMENT

Appellant, a citizen of the United States, served in the United States Army during World War II,

and was honorably discharged on August 23, 1943. On August 24, 1943, he filed a claim with the Veteran's Administration for compensation for service-connected disability (tuberculosis), and, on October 15, 1943, the Veteran's Administration, on a rating of 100% disability, made him an award of monthly payments of $100.00. This amount was increased by statute periodically, with the final increase, to $150.00 a month, becoming effective on December 1, 1949. Payments were made until June 30, 1951, at which time further checks could not be delivered since appellant's whereabouts were unknown (R. 23).

The Veterans' Administration, on July 9, 1951, by letter to his last known address, requested appellant to report for a physical examination on July 12, 1951 (R. 11). This he failed to do (R. 154) and no explanation was given to the Veterans' Administration for twenty-three months, nor did the Veterans' Administration have any knowledge of appellant's whereabouts during this period (R. 12). The regulations of the Veterans' Administration, 38 C.F.R. (1949 Edition), Section 3.251, provide for the suspension of benefits upon failure to report for physical examination. Section 3.266 permits resumption of such benefits after a subsequent physical examination.

Appellant had been convicted of violation of the Smith Act, but failed to surrender following the affirmance of that conviction by this Court in *Dennis* v. *United States,* 341 U.S. 494, on June 4, 1951. He was not apprehended until August 27, 1953, and is now serving his sentence for that conviction and for failing to surrender. On October 15, 1953, approxi-

mately two months after his apprehension, appellant requested reinstatement of his payments and expressed willingness to take a medical examination[1] (R. 122–123).

On June 2, 1954, while appellant's benefits were still suspended, the Chairman of the Veterans' Administration Central Committee on Waivers and Forfeitures notified him that the complete record pertaining to his claim for compensation was before that Committee to determine if a forfeiture of his benefits should be declared in accordance with the provisions of the forfeiture statute, Public Law 144, 78th Congress, July 13, 1943, 38 U.S.C. 728 (R. 60). After receiving appellant's letter replying to its charges (R. 124–135), the Committee held an informal hearing on October 4, 1954, at which appellant was represented by counsel (R. 137). On April 29, 1955, the Committee issued a decision forfeiting appellant's benefits on the grounds that his conduct subsequent to the commencement of the Korean War on June 27, 1950, constituted rendering assistance to an enemy of the United States within the meaning of the statute (R. 63).[2]

[1] Appellant was subsequently given a physical examination on June 21, 1955, which showed that his tuberculosis had reached a state of arrest. The compensation to which he would be entitled was thus reduced to $67 a month (R. 110).

[2] On March 2, 1956, appellant's wife was notified that, under Section 4, Public Law 144 (now 38 U.S.C. 3504(b)), which provides for an apportionment of the benefits to which a veteran would be entitled but for the forfeiture described in 38 U.S.C. 3504(b), action had been taken to award her an apportionment of 20% or $13.40. The award was made effective October 19, 1953, the date of receipt of evidence showing her husband's

An appeal was taken to the Board of Veteran's Appeals, and a hearing was held on July 10, 1956. On July 31, 1956, the Board affirmed the decision of the Committee (R. 22–41). Approximately two years after this decision, on June 27, 1958, appellant petitioned the Board for reconsideration of its holdings in light of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Wellman* v. *Whittier*, 259 F. 2d 163 (June 1958). Although it referred to the untimeliness of this petition,[3] the Board considered it on the merits, and in a written opinion of May 5, 1959, affirmed its prior decision (R. 42–56).

On July 8, 1959, appellant filed this suit in the District Court for a declaratory judgment and injunctive relief (R. 1–4). The complaint alleges that, as a result of the forfeiture decision, the appellee refuses to pay appellant benefits he is entitled to receive. The complaint further alleges that the forfeiture statute is unconstitutional and that appellee (the Administrator) acted unconstitutionally and in excess of his statutory authority. The complaint's prayer is for a judgment (1) declaring that the statutory provision for forfeiture is unconstitutional; (2) declaring that the forfeiture of plaintiff's pension benefits is illegal and unconstitutional; (3) ordering the defend-

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whereabouts. The amount was increased to $21.77 monthly on March 15, 1956, on the birth of a child, and appellant's wife was further informed that, upon evidence of her custody of a former child, an additional increase of $8.38 monthly would be considered (R. 151).

[3] Rule 20 of the Board's Rule of Practice (R. 168) provides that such petitions must be made within one year.

ant to pay to the plaintiff the veterans benefits due; and (4) granting such other and further relief as may be appropriate.

On the ground that the complaint sought a "permanent injunction restraining the enforcement, operation and execution of an Act of Congress," appellant requested the convening of a three-judge statutory court, pursuant to 28 U.S.C. 2282 and 2284 (R. 105). This request was granted and a three-judge court heard argument on appellant's motion for summary judgment and appellee's cross-motion for summary judgment and for dismissal of the complaint. On June 27, 1960, the District Court (Circuit Judge Fahy dissenting) granted appellee's motion for summary judgment and dismissed the complaint. This appeal followed. Appellant has also filed notice of appeal in the Court of Appeals for the District of Columbia Circuit and moved that court to hold the case in abeyance pending determination of this appeal. That motion was granted on November 4, 1960.

ARGUMENT

We do not dispute appellant's contention that this case presents substantial issues which warrant plenary consideration by an appellate court. Apart from the constitutional issues discussed in the Jurisdictional Statement, the case involves two statutory questions.[4]

[4] One of these is the application of the non-reviewability provision of 38 U.S.C. 211, which states (as enacted in the United States Code):

> "Except as provided in sections 784, 1661, 1761, and as to matters arising under chapter 37 of this title [none of which provisions are applicable to the present case], the decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any

In our view, however, jurisdiction to hear this appeal resides only in the Court of Appeals.

Direct review by this Court is authorized by 28 U.S.C. 1253 only when there has been a "suit or proceeding *required* by any Act of Congress to be heard and determined by a district court of three judges." [Emphasis added.] When the case is not one required to be heard initially by a three-judge court, direct appeal must fail. *Oklahoma Gas and Electric Co.* v. *Oklahoma Packing Co.*, 292 U.S. 386; *Phillips* v. *United States*, 312 U.S. 246; *Pendergast* v. *United States*, 314 U.S. 574.

Appellant's request for a three-judge district court was made under 28 U.S.C. 2282, which provides that only such a forum may grant an "interlocutory or permanent injunction restraining the enforcement, operation or any execution of any Act of Congress for repugnance to the Constitution of the United States * * *." Appellant's complaint, as noted above, demands judgment (1) declaring that the said forfeiture statutes are unconstitutional, "(2) de-

---

law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision."

The other question (to which appellant does not advert and which was not presented to the court below) is whether the term "rendering assistance to an enemy of the United States or of its allies," as used in the forfeiture statute, should be deemed to refer only to the offenses described in Article 81 of the Articles of War of 1920 and 1948 ("Relieving, Corresponding With, Or Aiding The Enemy") or the current successor provision, Article 104 of the Uniform Code of Military Justice (1950) ("Aiding the Enemy"). The Government does not contend that it has been shown that appellant violated the offenses described by these provisions of military law.

claring that the forfeiture of [appellant's] pension benefits is illegal and unconstitutional; (3) ordering the [Administrator] to pay to [appellant] the veteran's benefits * * *."

Obviously, the basic object of appellant's suit was to obtain review of the Administrator's action forfeiting his benefits. It is true that the complaint asked that the statute in question be declared unconstitutional, but a single-judge court can pass upon the validity of an Act of Congress in a suit to which 28 U.S.C. 2282 does not apply. See, *e.g., Reid* v. *Covert,* 351 U.S. 487; *Woods* v. *Miller Co.,* 333 U.S. 138; *Fleming* v. *Rhodes,* 331 U.S. 100.

There are sound reasons why the instant suit should be treated as one to which 28 U.S.C. 2282 is inapplicable. The "review" aspect of the appellant's action was primary, and the injunctive relief requested was incidental or secondary. More pointedly, appellant's complaint did not in terms request injunctive relief against the enforcement of the challenged statute. It is the request for such relief, as this Court has held, which may make appropriate or necessary the convocation of a three-judge court. In *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.,* 304 U.S. 243, 250, the Court observed:

> Section 3 [of the Act of August 24, 1937, 50 Stat. 752, the precursor of present Section 2282 of Title 28 U.S.C.] does *not* provide for a case where the validity of an Act of Congress is *merely drawn in question, albeit that question can be decided,* but only for a case where there

> is an application for an interlocutory or permanent injunction to restrain the enforcement of an Act of Congress. * * * Had Congress intended the provision in § 3 * * * to apply whenever a question of the validity of an Act of Congress became involved, Congress would naturally have used the familiar phrase "drawn in question" * * *. [Emphasis added.]

It is not the long-range effect of a court's decision, but the pleadings and the remedy sought, which determine whether a three-judge court must be convened. *Federal Housing Administration* v. *The Darlington, Inc.*, 352 U.S. 977.

The present case is similar in all essential respects to *Flemming* v. *Nestor*, 363 U.S. 603, and we concur in Judge Fahy's view that *Nestor* controls the jurisdictional question presented here. In that case, an action was brought against the Secretary of Health, Education, and Welfare to order him to restore the plaintiff's social security benefits, which had been forfeited under a provision similar to the forfeiture statute in this case. After observing that Nestor's action did draw the constitutionality of the statute into question, this Court stated:

> However, the action did no more. It did not seek affirmatively to interdict the operation of a statutory scheme. A judgment for appellee would not put the operation of a federal statute under the restraint of an equity decree; indeed, apart from its effect under the doctrine of *stare decisis*, it would have no other result than to require the payment of appellee's benefits.

Then, citing the *Garment Workers* case, *supra,* this Court held that the action was one for a single district judge. We believe the same to be true here.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction.[5]

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
J. WALTER YEAGLEY,
Assistant Attorney General.
KEVIN T. MARONEY,
ROBERT L. KEUCH,
Attorneys.

DECEMBER 1960.

[5] As noted in the Statement, *supra*, appellant has perfected an appeal to the Court of Appeals. The Court of Appeals will, of course, have jurisdiction even though the case was initially heard by three judges. *Healy v. Ratta*, 289 U.S. 701.

U.S. GOVERNMENT PRINTING OFFICE: 1960

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SUMNER G. WHITTIER, Administrator of Veterans' Affairs,

Appellee.

On Appeal from the United States District Court for the District of Columbia

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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On Appeal from the United States District Court
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APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

The Court Has Jurisdiction to Entertain the Appeal

This Court's jurisdiction to entertain the appeal herein, pursuant to 28 U. S. C. 1253, turns on whether the case is one required under 28 U. S. C. 2282 to be heard initially by a three-judge district court. Appellee urges in his Motion to Dismiss that the case is not required to be heard initially by a three-judge court and cites, as controlling, this Court's decision in *Flemming* v. *Nestor*, 363 U. S. 603. We urge

here that *Flemming* v. *Nestor* is distinguishable from the case at bar and is not controlling, and that this case is one required under 28 U. S. C. 2282 to be heard initially by a three-judge court.

A. *Flemming* v. *Nestor* is distinguishable from the case at bar and is not controlling.

Flemming v. *Nestor*, *supra*, is distinguishable from the case at bar in vital respects. In that case, although the constitutionality of the statute was drawn in question, plaintiff did not seek affirmatively to interdict the operation of a statutory scheme. The suit was one for statutory review and no declaratory judgment or injunctive relief was sought.

In the case at bar appellant does not merely draw the constitutionality of the Forfeiture Statute in question, rather he seeks affirmatively to interdict its enforcement and operation. The suit is for a declaratory judgment and injunctive relief. It seeks a declaration that the Forfeiture Statute is unconstitutional and it seeks injunctive relief coercing the Administrator of Veterans' Affairs, appellee herein, to make payment to appellant of service-connected disability compensation due at the time of the commencement of the suit and to become due (R. 1-4). Thus, unlike *Flemming* v. *Nestor*, judgment for appellant, here, would put the operation and enforcement of the Forfeiture Statute under the restraint of an equity decree.

B. The case is one required to be heard initially under 28 U. S. C. 2282 by a three-judge court.

An action for a declaration of the unconstitutionality of a federal statute is required to be heard initially by a three-judge court. For, such a declaration of rights "would be in effect a decision upon the constitutionality of a federal statute, having the same force and effect as an injunction

* * *." *United States* v. *149 Gift Packages*, 52 F. Supp. 993, 995 (E. D. N. Y. 1943); see also *Rolls-Royce* v. *Stimson*, 56 F. Supp. 22, 23 (D. C. D. C., 1944). Declaratory judgments are not mere advisory opinions, and 28 U. S. C. 2202 envisages the transformation of a declaratory judgment into a compulsory one. Here appellant has combined in his request for a declaratory judgment a request also for injunctive relief.

In addition, the relief sought in the case at bar comes within the scope of 28 U. S. C. 2282 as construed by this Court. The complaint alleges that "one of the purposes of this action is to enjoin the enforcement and execution of certain acts of Congress for repugnance to the Constitution" (R. 1). Although the prayer for relief does not in terms expressly pray for an order enjoining the operation and enforcement of the Forfeiture Statute, in effect it does precisely that. For it requests an affirmative declaration of the unconstitutionality of the Forfeiture Statute and a coercive order requiring appellant to refrain from giving effect to the statute by ordering it to pay to appellant compensation due him and to become due in the future.*

To confer jurisdiction on a three-judge court under 28 U. S. C. 2282, it is not necessary, as appellee appears to urge, that the relief requested be stated in express terms of enjoining the operation and enforcement of a federal statute (Motion to Dismiss, p. 8). It is the effect of the judgment sought which is controlling. *Lambert Run Coal*

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* In any event, the prayer for relief is not controlling in determining the relief to which the suitor is entitled. *Kansas City, St. L. & C. R. Co.* v. *Alton R. Co.*, 124 F. 2d 780 (C. C. A. 7, 1941). It is the pleadings taken as a whole which is decisive. Rule 8(f) of the Federal Rules of Civil Procedure; *Maty* v. *Grasselli Chemical Co.*, 303 U. S. 197, 200. And the allegations in the complaint, including the purpose of the suit alleged therein, as well as the prayer for relief, plainly show that appellant seeks affirmatively to interdict the operation and enforcement of the Forfeiture Statute.

Co. v. *Baltimore & Ohio Railroad Co.*, 258 U. S. 377; *Coffman* v. *Breeze Corporations*, 323 U. S. 316; *Federal Housing Administration* v. *The Darlington, Inc.*, 352 U. S. 977.

In *Lambert Run Coal Co.* v. *Baltimore & Ohio Railroad Co.*, *supra*, the plaintiff instituted suit in a state court to enjoin defendant, a private corporation, from applying certain rules pursuant to which defendant refused to furnish cars in accordance with established ratings and to require defendant to furnish such cars. Defendant removed the suit to the federal district court alleging as a defense that the rules were those promulgated by the Interstate Commerce Commission pursuant to an Act of Congress. Plaintiff then moved in the district court for an interlocutory injunction against defendant. Defendant moved to dismiss on the grounds that the proceeding was in effect one to stay an order of the Commission and that accordingly a three-judge court was required to hear the case. Defendant's motion was denied by the District Court. The Court of Appeals reversed the District Court, holding that the case was one for a three-judge court. This Court, in affirming, held (*supra* at 381-382):

> The rule of the railroad here complained of was that prescribed by the Commission. To that rule the railroad was bound to conform unless relieved by the Commission or enjoined from complying with it by decree of a court having jurisdiction. By this suit such a decree was *in effect* sought. The Appellate Court was therefore correct in holding that in such a suit an injunction of the District Court could be granted only by three judges. (Emphasis supplied.)

Coffman v. *Breeze Corporations*, *supra*, involved an action to enjoin defendants, as licensees of plaintiff's patent, from paying accrued royalties to the Government, as required under an Act of Congress. The complaint attacked the constitutionality of the Act and the United States was

permitted to intervene. A court of three judges was convened to hear the case. This Court held (*supra*, note 1, pp. 317-318):

> The District Court of three judges was rightly convened, although the suit was brought against private parties, not public offers. * * *
>
> Here the injunction sought would restrain appellee from payment of the royalties into the Treasury as required by the Act of Congress and would thus restrain the 'operation' or 'execution' of the statute.*

In *Federal Housing Administration* v. *The Darlington, Inc.*, *supra*, the Federal Housing Commission attempted to force respondent, owner of an apartment project, to cease and desist from certain rental practices forbidden by an Act of Congress. Respondent, contending that the Act of Congress, if so construed, was repugnant to the Constitution, instituted suit for a declaratory judgment as to its rights to engage in such practices and for an injunction restraining defendant from interfering with its operation of the apartment project. The District Judge before whom the case was pending requested that a three-judge court be convened. The three-judge court held that the complaint did not set forth a cause of action required to be initially heard by a three-judge court (*The Darlington, Inc.* v. *Federal Housing Administration*, 134 F. Supp. 337). Thereafter a single judge heard the case and held the statute unconstitutional (142 F. Supp. 341). On direct appeal, this Court reversed the judgment and remanded the case for consideration by a three-judge district court, although the

* The holding that the case was required to be heard by a three-judge court and that this Court had jurisdiction to entertain the appeal was made despite the fact that the Court held on the merits that the complaint failed to state a cause of action in equity or to present a justiciable controversy.

complaint did not in express terms request an injunction restraining the enforcement of an Act of Congress for repugnance to the Constitution.

In no one of the cases discussed above did the plaintiff seek in express terms to restrain the operation or enforcement of an Act of Congress. In each case this Court looked to the effect of the relief sought in determining the applicability, under 28 U. S. C. 2282, of the requirement of a three-judge court.

Appellant's contention as to the applicability of 28 U. S. C. 2282 to the case at bar does not rest, as appellee urges, on the "long range effect of a court's decision" (Motion to Dismiss, p. 9). In the first place it rests on the fact that appellant expressly stated that the purpose of the suit was to restrain the operation and enforcement of the Forfeiture Statute. In the second place it is not the long range effect of a "*decision*" which is here involved, rather it is the immediate effect of the *relief sought*, as framed by the nature of the suit and the complaint. And the immediate effect of the relief sought as framed by the nature of the suit and the complaint is to affirmatively interdict the operation and enforcement of the Forfeiture Statute.*

For the reasons discussed above the case was required to be heard initially by a three-judge court. Hence, this Court has jurisdiction under 28 U. S. C. 1253 to entertain the appeal.

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* Appellant's object was not merely to seek review of the Administrator's action. This is clear from the nature of the remedy he sought, namely, the remedy of the declaratory judgment and injunctive relief. And it is in connection with that remedy that the applicability of 28 U. S. C. 2282 must be considered. In *Hecht v. Nestor*, *supra*, Nestor did not seek that remedy.

CONCLUSION

The motion to dismiss should be denied and probable jurisdiction should be noted.

Respectfully submitted,

MARY M. KAUFMAN,
Attorney for Appellant.

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* Appellee concedes that the case presents substantial issues which warrant plenary consideration by an appellate court (Motion to Dismiss, p. 6).